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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 482

HERBERT FREDERICK KORHOLZ, ROCK WOOL INSULATING COMPANY, also known as ROCK WOOL INSULATION CORPORATION, a corporation,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

PHILIP B. PERLMAN
1021 Tower Bldg.,
Washington 5, D. C.
Attorney for Petitioners

October, 1959

PHILIP B. PERLMAN, WASHINGTON, D. C.

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

HERBERT FREDERICK KORHOLZ and the ROCK WOOL INSULATING COMPANY, also known as the ROCK WOOL INSULATION CORPORATION, a corporaton, pray that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the Tenth Circuit entered in the above entitled case on September 18, 1959.

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit, (Appendix A, *infra*, pp. 1a-11a) and the amendment thereto (Appendix C, *infra*, p. 13a) are not yet officially reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was first entered August 20, 1959, (Appendix B, *infra*, p. 11a) and became final September 18, 1959, when the opinion was amended and a petition for rehearing was denied (Appendix D, *infra*, p. 12a). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

STATUTE INVOLVED

The pertinent provisions of Sec. 302(a), (b) and (c)(2) of the Labor-Management Relations Act, 1947, 29 U. S. C. Sec. 186(a) and (b), are:

> 302(a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.
>
> 302(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.
>
> 302(c) The provisions of this section shall not be applicable * * * (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, set-

lement or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress;

* * *

QUESTIONS PRESENTED

In order to enable a long-time personal friend, who was president of a labor union local, to obtain a bank loan, petitioner Korholz, who was president of petitioner Rock Wool Insulating Company, (hereafter referred to as Rock Wool), personally guaranteed payment of the loan to the bank. At the time of this guaranty, no employee of Rock Wool was a member of any labor union, and nobody was a representative of any of Rock Wool's employees. The union president thereafter made only one payment on account of the principal amount of the loan, although he continued to pay the outstanding interest from time to time, and Korholz was called upon by the bank to make good on his outstanding obligation to the bank. Korholz discharged his obligation to the bank by a series of payments over a period of approximately two years, using for that purpose available funds from Rock Wool's bank account. The books of Rock Wool at the time treated these payments by Rock Wool as advances to Korholz. About fifteen months after the first such use of Rock Wool's account and over two years after the date of Korholz's guaranty, and only about seven and one-half months before the guarantee was met in full, the union became the bargaining agent for Rock Wool's employees. Prior to that time there was no bargaining of any kind, although there is some evidence that a few employees had been in and out of the union.

1. The first question is whether the use of funds in Rock Wool's bank account, in the circumstances above set forth, constituted a violation of section 302(a) of

the Labor-Management Relations Act, 1947, 29 U. S. C. 186(a). Involved in this question are the following subsidiary questions:

(a) Whether the president of the union was, *ex officio*, a representative of Rock Wool's employees within the meaning of the said section 302(a).

(b) Whether the use of funds in Rock Wool's bank account to enable Korholz to discharge his preexisting and valid personal guaranty to the bank constituted a wilfull and unlawful payment of money to the union president, as charged in the indictment, within the meaning of said section 302(a).

(c) Whether the said section 302(a) purports to make unlawful the above-stated use of Rock Wool's bank account on Korholz's behalf merely because Korholz's obligation to the bank, which was a perfectly valid and innocent obligation when made, matured at times when some of Rock Wool's employees had become union members.

2. The second question is whether the conviction of Korholz for wilfully aiding and abetting Rock Wool in violating the said section 302(a) may be sustained consistently with the due process clause of the Fifth Amendment of the United States Constitution where the payments to the bank were made on his behalf in order to discharge his valid, personal and innocent obligation of guaranty which existed before any employee of Rock Wool affiliated with any union, but which matured at a time after some of Rock Wool's employees became union members.

3. The third question is whether the discharge of Korholz's guaranty obligation, in the circumstances of

this case, is, in any event, exempt from the provisions of said section 302(a) by virtue of the provisions of section 302(c)(2) of the Labor-Management Relations Act, 1947.[1]

STATEMENT OF THE CASE

Rock Wool Insulating Company was indicted, tried, convicted and sentenced to pay a fine in the United States District Court for the District of Colorado for violating Sec. 302(a) of the Labor-Management Relations Act, 1947, 29 U. S. C. 186, which prohibits any employer in commerce from paying or agreeing to pay any money to any representative of any of his employees. Herbert Frederick Korholz, president of Rock Wool, was indicted, tried, convicted and sentenced to imprisonment for four months and to pay a fine of $500 for aiding and abetting the company. The judgment of the District Court was affirmed on appeal, and a petition for rehearing was denied after the Court of Appeals amended its original opinion. (Appendix A, B, C and D, *infra*, pp. 1a-12a). The facts upon which the prosecution is based may be stated as follows:

Korholz, a resident of Pueblo, Colorado, is the president of the Rock Wool Insulating Company, which manufactures insulating materials and ships its products in commerce. Its main office and plant is also in Pueblo. Until September 21, 1955, when the company entered into a contract (Gov. Ex. 24)[2] as of August 31,

[1] In the event this petition is granted, petitioners reserve the right to argue the additional questions set out, *infra*, pp. 20 to 21.

[2] References herein to the printed record used in the court below are designated R, as R.—; to the exhibits in the separate exhibit folder as Def. or Gov. Ex.

1955, with Chauffeurs, Warehousemen and Helpers Local Union No. 146, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, the company conducted a non-union operation. The labor contract, pursuant to an NLRB election, provided that "due to the complicated details of wages and working conditions for over-the road drivers, they shall be covered in a separate agreement."[3]

Sometime during the year 1952 Korholz and Fred William Bierig, the president of the union, local 146, in Pueblo, discovered that they both had come originally from the town of Duesseldorf, Germany, where, as boys, many years before, they had been schoolmates (see affidavit of Fred W. Bierig, attached to his amended motion for a new trial, R. 21). They exchanged memories of families and places and began again an association on a personal basis. It eventually developed that Bierig was in financial difficulties through his efforts to purchase a home for himself and his family (R. 27). He told his troubles to Korholz, who was sympathetic. Arrangements were made for Bierig to borrow $2,000 from the Arkansas Valley Bank, the payment of the loan by Bierig to be guaranteed to the bank by Korholz (R. 83). On August 6, 1953, Bierig received the loan from the bank and signed a promissory note, due six months later, for $2,060, the amount of the loan plus interest (Gov. Ex. 45, Def. Ex. D). Korholz then signed what is known as a continuing guarantee (Def. Ex. E, R. 129, 130) which obligated Korholz personally to pay to the bank any and all sums of money loaned or advanced at any

[3] No such agreement was introduced in evidence, but we are informed that a separate agreement relating to the drivers was executed on April 24, 1956, to cover a term to August 1, 1957.

time to Bierig, and to pay all notes and obligations and any renewals thereof made by Bierig, the borrower.

It is extremely important to emphasize the fact that, at the time Bierig made the loan from the bank, and Korholz guaranteed payment, not a single employee of Rock Wool belonged to the Union, Local 146, or any other union. Neither the union nor Bierig, its president, had been authorized to represent any employee of the company. As has been stated, the union as such did not become the bargaining agent of the employees of the company until August 21, 1955 (R. 52), more than two years after Bierig had made the original loan from the bank and the repayment by Bierig had been guaranteed by Korholz; and it does not appear that Bierig was ever authorized individually to represent any of the employees. It should also be stated at this point that all of the subsequent transactions between the bank and Bierig and Korholz grew out of and were integral parts of the arrangements made on August 6, 1953.

Although he was the president of Local 146, Bierig was not the real executive of the union. He took his orders from Paul M. Graf, Jr., secretary-treasurer and business manager of the local (R. 56) who was the negotiator and the chief spokesman for the union (see affidavit by Bierig, R. 24).

When Bierig's note became due, February 2, 1954, he paid the bank $560 on account of his obligation, being $500 on principal and $60 interest, (Def. Ex. A and B), and signed a new note dated February 2, 1954 for $1515 as evidence of the balance due on his original indebtedness to the bank, plus interest for sixty days (Gov. Ex. 45, Def. Ex. D-1). This note became due April 3, 1954, and by that time Bierig was in financial straits and unable to make a payment on

principal. On April 21, 1954, he did, however, pay the accumulated interest of $19.50 (Gov. Ex. 47A) and signed a renewal of his note, to become due June 21, 1954.

Korholz had control of two accounts at the Arkansas Valley Bank, one known as the MPM Investment Company account, MPM being a Korholz family investment company (R. 149), and the Rock Wool account, of which company he was and is president. After it became evident that Bierig could no longer make payments on his principal debt, the bank called on Korholz to make good on his guarantee (R. 130). Under instructions given by Korholz, in response to these demands, the principal of Bierig's loan was reduced from time to time, as renewal notes were signed by Bierig, the amount of reductions being first charged against the MPM account, and when that account lacked funds, then the MPM account was balanced by transferring the charges to Rock Wool's bank account (R. 116). The first reduction through such charges was made in June, 1954. During the period fixed by the indictment, Rock Wool carried all these charges on its books as advances to or charges against Korholz or MPM. Bierig's obligation to the bank was fluctuated upward only once, December 23, 1954, when it rose from $713.50 to $1,522.50, and then went down until it was completely liquidated April 17, 1956 (Gov. Ex. 45). All during the period of his loan, with its successive renewals, Bierig paid the interest charges by his personal checks, the last for $9 being dated in January, 1956 (Gov. Ex. 45 and 47A, *et seq.*). The exhibits show that Bierig personally paid all of the interest charges on his loan except the final interest charge of $5. Gov. Ex. 45 shows that the amount of the loan made by the bank to Bierig on August 6,

1953, was never increased thereafter above the original loan, and only once did it reach the point to which it had been reduced by Bierig through his first payment of $500 on account. And when Korholz was required to meet the obligation of his guarantee, Bierig understood that he would pay Korholz back when he was financially able to do so (See Bierig affidavit, R. 29). Korholz used Rock Wool's bank account to meet the payments made to the bank on his personal guarantee.[1] The bank charged the amounts by which the Bierig notes were reduced first to MPM and then to Rock Wool, and these charges, as stated, during 1954 were carried on the books of the company as charges against or advances to Korholz, and during 1955 and thereafter to MPM. (Testimony of Charles I. Thompson, accountant with Price Waterhouse and Company; (R. 142, 148, 149)). This was the situation throughout the period laid in the indictment—June 15, 1954 to April 17, 1956 (R. 9). Unfortunately, the record is not clear as to what changes or adjustments were made on Rock Wool's books after January, 1957, as a result of the studies of operations in prior years for the company by Price Waterhouse. There are indications that the company charges against Korholz and MPM were treated or to be treated as an expense for labor relations, but Mr. Thompson testified that it would not be proper in the year 1957 to charge these items to the current year's expense. "It would not be an ex-

[1] So many of the Government's exhibits were introduced without adequate explanation of their contents that it is impossible at this stage to say whether they show the actual financial relationship between Korholz and Rock Wool; in other words, whether charges for Korholz were made against Rock Wool because, in the overall picture, Rock Wool owed large amounts of money to Korholz.

pense." (R. 148) However, the period covered by the indictment ends April 17, 1956 (R. 9).

It should be noted that whatever arrangements Korholz made with Rock Wool and with the bank to meet his guarantee on the Bierig notes, there is no testimony whatever to indicate that Bierig ever knew that Rock Wool was involved in the matter in any way. Bierig's financial transactions were with Korholz personally, and Korholz individually was his guarantor.

The record in this case indicates that the Government procured the indictment against the Company and against Bierig under sec. 302(a) and (b) and against Korholz as an aider and abettor (R. 8), on the theory that a so-called "Recognition Agreement" between the company and the union existed at the time that Korholz became a guarantor on Bierig's promissory note. Despite the fact that the Government, in its opening statement to the jury promised to prove the "recognition agreement" (R. 39) the Government failed to prove any such agreement. Frequently discussions about the alleged "recognition agreement" were held in the presence of the jury, which was undoubtedly misled about it. A substantial part of the record is devoted to the efforts by the Government to impress the court and the jury with the importance of the "recognition agreement" which never was admitted in evidence.

Nevertheless the Government, in its brief in the Court of Appeals, began its statement of facts by saying that "During the period from July 6, 1953 to August 31, 1955, there was a recognition agreement between the appellant Rock Wool Insulating Company and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 146 (R. 58) hereinafter called the Union."

This, together with the confusion about it in the trial court, misled even the Court of Appeals in its original opinion, into saying that "From July 6, 1953 to August 31, 1955, there was a 'recognition agreement' in effect between the company and Local No. 146." The effect of all this was to put the union as such and Bierig, its president, into the situation as labor representatives from a date prior to the Korholz guarantee, although, as stated, the union did not become the bargaining agent until September 21, 1955, more than two years after the guarantee was made. When this error of fact was called to the attention of the Court of Appeals it eliminated from its opinion the sentence reading "From July 6, 1953 to August 31, 1955, there was a 'recognition agreement' in effect between the company and Local No. 146." (Appendix C, *infra*, p. 11a)

In addition to its reliance upon the alleged "recognition agreement," the existence of which was never proved, the Government sought to prove a violation of Sec. 302 of the Labor Management Relations Act, 1947 by attempting to show that sometime *after* the date of the guarantee by Korholz there were company employees who had joined the union, Local 146. The only employees involved were the drivers; and the Government offered no testimony as to the workers in the plant or any other class of employee. Luther E. White applied for membership in the Union on December 12, 1953 (R. 152). He testified that at that time the company employed only about four or five drivers (R. 155). White also testified that for a period of 8 or 9 months (he believes it was in 1955) he had a withdrawal card from the union because he held a supervisory job (R. 151). White's payroll records are shown in Gov. Ex. 21. His union application is among the exhibits numbered Gov. Ex. 41. But he is an employee

who was in and out of the union after the date of Koelholz guarantee. There are two applications for union membership by Price Green among the Government's exhibits (No. 38), one dated July 18, 1955, and another November 16, 1954, but Green appears to have been in and out of the union during 1955, his second application card indicating that he was reinstated October 12, 1955. Lawrence Brinlee's application (Gov. Ex. 40) is accompanied by a signed statement (undated) indicating he had withdrawn from Local Union 146 and had not rejoined. However his ledger record card with the union (Gov. Ex. 33) indicates that in February, 1955 he was no longer employed by Rock Wool, and that in 1955 he was suspended by the union. There are several application cards of Floyd M. Day for union membership (Gov. Ex. 42), one dated July 29, 1954 and another dated July 18, 1955, and indicating that Day was reinstated October 10, 1955. Day's ledger record with the union shows (Gov. Ex. 35) that he was suspended from the union July 1, 1955. There is an unidentified card attached which indicates Day may have been suspended again October 1, 1956. Ronald B. Haddock's application card (Gov. Ex. 39) is dated April 4, 1954, and his union ledger record (Gov. Ex. 36) shows that Day was suspended from the union Dec. 31, 1954. Of the five drivers, White, Green, Brinlee, Day and Haddock,—and that seems to have been about all during any part of the period laid in the indictment, who were in and out of membership in the union, three—Brinlee (R. 164), Haddock (R. 157) and White (R. 150)—testified in the case. Apparently they understood rather clearly that the union would not be in a position to bargain collectively for them until it had, by a vote of the majority of the employees, been certified as the bargaining agent.

There is no indication whatever that any of them expected the union to represent them individually, and there is no testimony in the record that either the union or Bierig made any effort to represent any of the drivers in negotiations with Rock Wool until Local 146 had been certified by the National Labor Relations Board in August, 1955. In fact, Paul M. Graf, Jr., the secretary and treasurer and business manager of Local 146, testified "nobody can represent the employees for working conditions or anything else unless you have a majority of the people organized and representing the majority of them in any plant" (R. 192). At various times during 1954 Rock Wool sent checks to Local 146, representing deductions for union dues from several of the drivers, but the record does not indicate how or when this practice started or the extent of its application (Gov. Ex. 4A to 4E). There is no evidence that Korholz personally knew when any of Rock Wool's employees joined or left or rejoined the union.

The case was tried on the Government's testimony, the trial court denying motions for directed verdict (R. 212). The mandate from the Court of Appeals has been stayed to await action on this petition (Appendix D, *infra*, p. 12a).

REASONS FOR GRANTING THE WRIT

1. The prosecution involved herein is prohibited by both constitutional and statutory provisions. This case is of extreme and continuing importance because it involves an attempt by the Government to give a retrospective, even *ex post facto*, interpretation and effect to labor legislation in a criminal prosecution. It is of extreme and continuing importance because the result ignores the plain provisions of Sec. 302(c)(2) of the

Labor Management Relations Act, 1947 which exempt such transactions as those upon which the prosecution in this case is based. It is of extreme and continuing importance because it involves jail sentences and fines on persons who are not guilty of any crime. It is of extreme and continuing importance because the only rational explanation of the convictions by the jury on the facts in the record is that the union mentioned is a Teamster union, some of the officers of which (but not this one) have been involved in nation-wide charges of bribery, corruption and gangsterism. That this situation, highly prejudicial to the petitioners, existed and was in the forefront of the minds of the judge and the jury too, is highlighted by the trial judge's statement to counsel, after the convictions: "The Congress felt and, of course, we all know the present committees that are engaged in investigating in this same field that it is a matter that should not be countenanced and should not be condoned." (R. 220) And so the trial Court confused this case, involving perfectly normal relationships between two boyhood friends, with the then current newspaper accounts of bribery and corruption and other crimes involving different constituent parts of the same union.

The facts in this case simply do not support a charge of unlawful payment by an employer to a representative of his employees, and receipt of money from the employer by such a representative. Sec. 302 of the Labor Management Relations Act, 1947 was enacted to prevent collusion and worse between employers and labor representatives. The legislative purpose has been stated often in many cases by this Court. It has nothing to do with such a situation as is present here. Two boyhood friends in Germany meet thousands of miles away and a generation afterward. One is the presi-

dent of a company, the other the president of a union. The union official had personal financial troubles, and the more prosperous one agreed to help. No labor issue or problem was involved. There is not a shred of evidence, or a suggestion of any kind that the president of the company needed or wanted any labor favor from the union or the union official or vice versa. Not a single one of the company employees belonged to the union, and the president of the company had no objections to union membership (R. 159).

Bierig, the union president, borrowed $2,000 from a bank. This was not a payment to him in the sense that that word is used in Sec. 302(a) and (b) of the Labor Management Relations Act, 1947. Bierig did not receive the money as his own. He was obligated to pay it back. And, at the time (August 6, 1953) Bierig made the loan and Korholz made the guarantee, Bierig did not represent any employees, nor did his union, and Korholz neither then nor thereafter was regarded by the Government as the employer. But whether he was or not, nobody committed any crime in August, 1953, when Bierig made his loan and Korholz guaranteed it. Nor was any crime committed when, six months later, in February, 1954, Bierig paid out of his own pocket the sum of $500 to reduce the principal of his loan, and $60 in interest; nor, two months later, in April, 1954, when Bierig paid the interest but was unable to pay anything on principal and signed a renewal note, to become due in June, 1954. Now how did this transaction, innocent and legal, according to the Government's evidence, when entered into, and for a long time thereafter, become criminal? And who were the criminals?

Bear in mind that the Government did not offer any evidence, and there is none in the record anywhere, at

lacking the *bona fides* of the loan transaction and of the guarantee, or attacking the good faith of Bierig in promising to repay, or ascribing any ulterior or bad or corrupt motives either to Bierig or Korholz or the company. To the contrary, the painful payments of interest to the bank by Bierig, in financial straits as he was, negate any such idea. And Bierig paid all of the interest over the years, except the sum of $5 at the end.

In June, 1954, when Bierig became in default, payments of $300 to the bank were made by Korholz, who used Rock Wool's bank account for the purpose. The Government contends that when Korholz used Rock Wool's account to meet his guarantee, that act made criminals out of Korholz and Bierig, although all that happened was that Bierig's obligation to pay the bank was gradually transferred from time to time into an obligation to pay Korholz, and made a criminal out of Rock Wool, although there is no evidence, first, as to the nature of the financial relationship between Rock Wool and Korholz, and no evidence that Bierig ever knew that Rock Wool's bank account was being used by Korholz to meet the guarantee. There does not seem to be any reason why Korholz could not have used the company's bank account, or any other bank account over which he had control, to settle his obligation to the bank, without making criminals of the debtors and the company. This action cannot be construed to be a violation of any provision of the Labor Management Relations Act, 1947.

Initially, the Government had developed a theory that criminality was involved on the basis of the alleged existence of a prior "recognition agreement" between the company and the union; and when that alleged agreement was excluded from the case, the

Government tried to fill the gap by relying on it anyhow, as the record discloses. Failing in the "recognition" argument, the Government now contends that the subsequent joining of the union by two or three employees of Rock Wool somehow made the loan and the guarantee illegal *ab initio*, especially as still later on the union was formally recognized as the bargaining agent for Rock Wool. This necessarily was the basis of the decision below, especially after the Court of Appeals, by amending its original opinion, eliminated the "recognition agreement" from the case.

But this contention is surely unsound. This Court long ago held in *United States* v. *Fox*, 95 U. S. 670 that "The criminal intent essential to the commission of a public offense must exist when the act complained of is done; it cannot be imputed to a party from a subsequent independent transaction." This Court held that legislation designed to punish acts under the circumstances stated in the *Fox* case would be unconstitutional.

In *United States* v. *Dietrich*, 126 Fed. 671 (C.C., D. Neb. 1904), it was held that an indictment charging a Senator with accepting a bribe for obtaining an appointment to office for somebody else could not be sustained where it appeared that the defendant, although elected to Congress, had not become a member of Congress until after the alleged event had occurred. And in *Terry* v. *United States*, 131 F. (2d) 40, (C.A. 8, 1942), the Circuit Court of Appeals had before it a conviction on an indictment charging the making of false statements in a matter within the jurisdiction of a federal agency. The false statements were made to a private corporation which used them to obtain insurance for itself from the Federal Housing Administra-

tion. The Court said (p. 44), "We are of the opinion that on the charge and proof in this case it would be contrary to the legislative intent to sustain this conviction. It is clear that the Housing Administration had no cognizance of the Williams loan transaction on which the indictment rests at the time of the commission of the acts charged against the defendant in respect to that transaction. Whether the Administration would or would not obtain such cognizance depended entirely upon the free will of other parties over whom defendant had no control, and it is contrary to elemental principles of the criminal law that an act which is not criminal at the time of its commission may not be converted into a crime at a subsequent time by the independent action of other persons." And the court cited the *Fox* and *Dietrich* cases, *supra*.

It is submitted that under the authorities cited and facts in this case, no offense was committed at the time Korholz guaranteed Bierig's loan, and that the subsequent acts of any of Rock Wool's employees in joining or leaving or rejoining the union could not clothe the loan transaction or the Korholz guarantee with criminality.

2. There are other considerations which show the inapplicability of Sec. 302(a) or (b) of the Labor Management Relations Act, 1947. In the first place, Bierig, who obtained the loan, was not a representative of Rock Wool's employees. It has been pointed out that at the time the loan was made, neither Bierig nor the union represented any employees. Again, even after the union became the bargaining agent, in August, 1955, more than two years after the debt was contracted, assuming that Korholz, who was not an employer, could be prohibited from meeting his obliga-

tion to the bank, it does not appear that Bierig represented the employees. The mere fact that Bierig was the president of Local 146 did not automatically make him a representative of the employees within the meaning of the Act. This is the question expressly left open for later consideration by this Court in *United States v. Ryan*, 350 U. S. 299, where the Court said, "We do not decide whether any official of a union is ex officio a representative of employees under Sec. 302." In determining that Ryan, the respondent in that case, was a representative within the meaning of Sec. 302, this Court pointed out that Ryan represented the employees both as union president and as principal negotiator. In the case at bar the principal negotiator, together with a committee of which Bierig was not even a member, was Paul M. Graf, Jr., secretary-treasurer and business manager (R. 56, 72, 171). Bierig, in his affidavit, said that Graf instructed him (Bierig) to stay away from the Rock Wool plant, and Bierig had nothing to do with the negotiations (R. 24).

The question as to the status of a union president in this connection is still a question of continuing importance and is not resolved by the recently enacted Labor-Management Reporting and Disclosure Act of 1959, approved September 14, 1959, which adds, in the new Section 302(a)(4), additional requirements of proof to bring a union officer, as such, within its prohibitions.

3. The Court below failed to apply the provisions of Section 302(*c*)(2) of the Labor Management Relations Act, 1947, which provide that the provisions of Sec. 302 shall not apply with respect to the payment or delivery of any money "in compromise, adjustment,

settlement or release of any claim, * * * in the absence of fraud or duress."

The bank's claim against Korholz is certainly such a transaction as is entirely outside of the prohibitions of Sec. 302. The Government never charged or offered to prove that Korholz's payments in settlement of the bank's claim against him were created through fraud or duress. The Government merely contends that if the transaction was not criminal when entered into, it became criminal later on; that Korholz, who was solely liable to meet Bierig's defaulted loan, had, because he used the company's bank account to discharge his liability, substituted the company as the principal criminal, and that he, Korholz, was not an employer of labor but was an aider and abettor. It should be noted that the provisions in the Act of 1947 expressly exempting the application of 302 from transactions involving the settlement of claims, is repeated verbatim in the Labor-Management Reporting and Disclosure Act of 1959.*

4. Other defenses. In the courts below the petitioners contended among other things that the count in the indictment upon which they were convicted is duplicitous, in that it alleges a number of alleged offenses, thus depriving the petitioners of the opportunity to make a defense against a particular alleged violation. It is submitted that the indictment offends Rule 8(a)

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* The completely absurd and artificial basis of the convictions in this case can readily be seen when it is realized that if Korholz had actually become the employer himself and Bierig was clearly the representative of Korholz's employees, no offense would have been committed because of the exonerating provisions of Sec. 302(c)(2). Similarly, if Rock Wool had made the original guaranty, its subsequent discharge of that obligation would have been perfectly legal under the same Sec. 302(c)(2).

of the Federal Rules of Criminal Procedure, which provides that:

> "Two or more offenses may be charged in the same indictment or information *in a separate count for each offense*, if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." (Emphasis added.)

One of the other defenses upon which petitioners relied below is that there is a fatal variance between the allegations in the indictment and the proof. The indictment charges the payment of money by Rock Wool to a representative of its employees. Rock Wool never paid any money to Bierig, assuming that he was a representative of employees. The Government, for reasons suitable to it, did not charge the payment of a thing of value, but limited the accusation to the payment of money to Bierig by Rock Wool, which was not proved.

Another defense is the entire lack in the record of any evidence from which it could be found, even by inference, that there was any wilful violation of Sec. 302 of the Labor Management Relations Act, 1947, as required by Sec. 302(a). The refusal of the trial court to grant a proper instruction on that issue was protested in the district court and in the Court of Appeals.

These issues, raised below, are not abandoned on this petition, but the petitioners reserve the privilege of urging them in greater detail upon this Court in the event the petition is granted and the writ is issued.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN
1021 Tower Bldg.,
Washington 5, D. C.
Attorney for Petitioners

October, 1959

APPENDIX A

FILED
United States Court of Appeals
Tenth Circuit
AUG 20 1959
Robert B. Cartwright, Clerk

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

May Term, 1959

No. 6088

HERBERT FREDERICK KORHOLZ, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

No. 6089

FRED WILLIAM BIERIG, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

No. 6090

ROCK WOOL INSULATING COMPANY, also known as Rock Wool Insulation Corporation, a corporation, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeals From The United States District Court
For The District of Colorado

Vasco G. Seavy, Sr., (Charles E. Grover and Anthony F. Zarlengo were with him on the brief) for Appellants Herbert Frederick Korholz and Rock Wool Insulating Company.

John J. Gibbons for Appellant Fred William Bierig.

Robert S. Wham, Assistant United States Attorney, (Donald E. Kelley, United States Attorney, was with him on the brief) for Appellee.

Before Bratton, Chief Judge, and Phillips and Lewis, Circuit Judges.

LEWIS, Circuit Judge.

These consolidated cases present the appeals of a union official, a corporate employer, and its president, each having been convicted of a violation of 29 U.S.C.A. 186.[1] Claim is made by appellants that the indictment is basically faulty, that the evidence is insufficient to establish the elements of the statutory offense, and that the court erred in rulings as to the admissibility of evidence and in refusing two tendered instructions.

The indictment was in two counts. Count one charged that from about June 15, 1954 to April 17, 1956, Rock Wool Insulating Company did wilfully and unlawfully pay a total of $2,305 in money to Bierig who was then a representative of that company's employees and that Korholz, the company president, did wilfully aid and abet in the commission of the offense. Count two accused Bierig of the unlawful and wilful receipt and acceptance of the prohibited payment. The use of the words "a *total* of $2,305.90 in *money*" premise appellants' principal contentions urging reversal

[1] 29 U.S.C. 186: "(a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

"(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value

• • • "

and must be considered with an understanding of the factual background of the transaction.

On August 6, 1953, Bierig borrowed $2,000 from the Arkansas Valley Bank of Pueblo, Colorado, the indebtedness being evidenced by his promissory note due in 180 days and individually guaranteed by Korholz by separate instrument.[2] On the due date, Bierig paid the interest and $500 upon the principal and executed a renewal note for $1,515 representing the balance due under the first note with interest charged in advance. The note was thereafter renewed ten times, Bierig paying the interest but making no further payment upon principal. On one occasion in 1954 the principal amount was increased by $800 which Bierig received from the bank. The note was ultimately discharged on April 17, 1956, after a series of principal payments credited by the bank, in accordance with authorization from Korholz, through debiting an account owned by the Korholz family. In one instance only, a direct debit was made against the Rock Wool Company account but in each other instance Rock Wool reimbursed the Korholz family account. Rock Wool's books reflected these payments as advances to its president, Korholz, until an accounting adjustment made in 1957 entered the amounts as expenses for labor relations service.

Appellants' complaint as to the indictment lies in the use of the words of aggregation describing payment made by Rock Wool and accepted by Bierig, "a *total* of

[2] The guarantee provided:

". . . I. . . . hereby promise to pay to the Bank any and all sums of money which the said Bank may at any time loan or advance to the Borrower.

"This agreement and guarantee applies to the payment of all notes and obligations made by the Borrower to the Bank, and any renewals thereof or continuances, whether in whole or in part. This is a continuing guarantee."

$2,305.00." The fact that the words were used to signify numerous transactions of delivery and receipt, they urge, is borne out by evidence that the company made thirteen separate payments on eight different notes. Since proof of any one of these transactions would be sufficient to show a violation of that section of Taft-Hartley Act cited above, they contend the indictment is duplicitous and permits the jury to arrive at a verdict of conviction even though the jurors cannot agree as to the fact of any particular transaction. Inductive reasoning leads appellants to assert that Rule 8, Federal Rules of Criminal Procedure, and the cases of Ebeling v. Morgan, 237 U.S. 625, 35 S. Ct. 710, 59 L. Ed. 1151, and Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306, require the prosecution to set forth each act in a separate count and prosecute it as a separate offense although concededly such could be done by one indictment and one trial. The Ebeling case permitted the prosecution and imposition of sentence on each of seven counts which separately alleged the cutting of a different mail bag, although all the destruction was a part of the same transaction. The Blockburger case was a narcotics case which approved of the prosecution as separate offenses of two sales of narcotics to the same buyer within a short period of time. But compare these cases with the recent case of Bell v. United States, 349 U.S. 81, 75 S. Ct. 620, 99 L. Ed. 905, where it was held that the transportation of two women for immoral purposes constituted but one punishable offense.

Whether or not appellants could be charged, convicted and sentenced for thirteen violations of 29 U.S.C. 186 is of little consequence in the present case for the question is not raised by the posture of the case. The charge here was single, a violation of the Taft-Hartley Act, although the indictment undoubtedly proposed proof of guilt by a series of acts. The situation is analogous to that in Crain v.

United States, 162 U.S. 625, 16 S. Ct. 952, 40 L. Ed. 1097, where it is said at page 636 of the official reporter:

> "We are of the opinion that the objection to the second count upon the ground of duplicity was properly overruled. The evil that Congress intended to reach was the obtaining of money from the United States by means of fraudulent deeds, powers of attorneys, orders, certificates, receipts, or other writings. The statute was directed against certain defined modes for accomplishing a general object, and declaring that the doing of either one of several specified things, each having reference to that object, should be punished by imprisonment at hard labor. . . . We perceive no sound reason why the doing of the prohibited thing, in each and all of the prohibited modes, may not be charged in one count, so that there may be a verdict of guilty upon proof that the accused had done any one of the things constituting a substantive crime under the statute. And this is a view altogether favorable to an accused, who pleads not guilty to the charge contained in a single count; for a judgment on a general verdict of guilty upon that count will be a bar to any further prosecution in respect of any of the matters embraced by it."

This rule has been codified in Rule 7(c) of the Federal Rules of Criminal Procedure: "It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means." The cases reveal that a complaint of duplicity is rarely made where but a single statutory prohibition is involved since the effect of joining several violations as one redounds to the benefit of defendant. As was said in Mellor v. United States, 8 Cir., 160 F. 2d 757, 762:

> "We know of no rule that renders an indictment duplicitous because it charges as one joint offense a single completed transaction instead of charging in separate counts as many offenses as the evidence at the trial might conceivably sustain."

See also Hanf v. United States, 8 Cir., 235 F. 2d 710.

Since we reject appellants' contention that the indictment is basically faulty we must similarly reject several supplemental claims. The trial court committed no error in admitting evidence as to all payments made to the bank and in rejecting appellants' proposed instruction that the jury must limit its consideration to only the first of the series of payments made. The defendants were charged with but a single offense and the government had no burden nor duty to limit its proof to or elect to stand upon a single transaction.

Next, appellants point out that the indictment charges Rock Wool with the payment and Bierig with the acceptance of "2,305.00 in *money*" and that the proof shows the money was paid to and received by the bank in discharge of Bierig's obligation. This, appellants assert, is a fatal variance. It is conceded that the defendants could have been charged with having given and received "something of value" under Section 186, but it is insisted that having framed its charge in terms of money the government is bound to substantiate that charge with a showing of an actual exchange of money.

In our view, there is no variance. Although the money was taken from the employer's account and credited to Bierig's obligation by the bank through a series of transactions involving a third account, the gist of the offense was the payment of money in violation of the statute. The record shows that the bank acted as agent for both parties with their complete approval and the effect of the trans-

action was not altered by the peculiarities of their arrangement. The mere failure of the indictment to set forth each step of the transfer of funds does not create a fatal variance. Cooper v. United States, C.A. D.C., 30 F. 2d 567; Peck v. United States, 7 Cir., 65 F. 2d 59. Cf. Madsen v. United States, 10 Cir., 165 F. 2d 507; United States v. Cox, 7 Cir., 147 F. 2d 587.

The indictment alleged that Local Union No. 146 was representative for collective bargaining purposes of certain employees of Rock Wool Insulating Company during the period from June 15, 1954 to April 17, 1956, and that Fred Bierig represented said employees in his capacity of officer of Local Union No. 146. Appellants claim that the evidence fails to substantiate this allegation and further claim that there is no evidence to show, if such was the fact, that the company or Korholz knew during that time that the union represented any company employees.

The evidence does show that certain truck drivers had affiliated with Local No. 146 prior to the stipulated date of N.L.R.B. election, August 31, 1955, and during the period named in the indictment. But the drivers testified that they knew at the time of joining the local that they were not a majority of the employees of Rock Wool Insulating Company and that the union was not in a position to bargain, under N.L.R.B. authority, without a majority. One driver testified that it was his understanding that the purpose of signing up was to get a union contract for the drivers alone, without regard to the status of the production employees. The witnesses stated that prior to August 31, 1955, they knew of no bargaining between union and company with reference to wages, hours, or conditions. The application cards which they signed, however, designated the union as their representative for collective bargaining.

The meaning of the term "representative" as used in Section 186 has been considered in only a limited number of

cases, but the case of United States v. Ryan, 350 U.S. 299, 76 S. Ct. 400, 100 L. Ed. 335, has positively negatived appellants' theory that the only payments proscribed by this section are those made to an exclusive bargaining representative.

In Brennan v. United States, 8 Cir., 240 F. 2d 253, cert. den. 353 U.S. 870, the Court of Appeals endorsed an instruction defining "representative" as including any person who is empowered or authorized in any way to represent an employee or employees in dealing with the employer in matters relating to wages, hours, or working conditions and stating:

> "If a person be so authorized to act it is not necessary that he actually exercise all or any of the powers conferred upon him. Representative as used in this Act may also include one who is empowered, authorized or designated by any employee or employees to represent any employee or employees in any negotiation with their employer for the establishment of a new union and its recognition by such employer as a representative of said employees in any matter related to their wages, hours, or working conditions."

Regardless of the fact that the union did not have sufficient power through representation to negotiate with the employer under statutory authority, the union was authorized by at least *three* of the employees to act in their behalf in matters concerning their employment.

Mr. Korholz had dealt with Mr. Bierig over a period of time as a union officer, accepting his services in attempting to increase sales of Rock Wool Insulating Company at union construction jobs and discussing the possibility of the organization of the company employees. From July 6, 1953 to August 31, 1955, there was a "recognition agreement" in effect between the company and local No. 146.

One of the drivers testified that he asked Mr. Korholz if he would approve of the employees joining the union and was told that it didn't matter one way or another to the company. Finally, the payments on the note were charged on the company's books as labor relations expenses. Although there is no direct evidence showing that any officer or employee had knowledge of the contents of the drivers' union application cards which appointed the union as their representative, the circumstantial evidence is sufficient to permit the jury to infer that the company made the payments on the Bierig notes because Mr. Bierig was a representative of labor in its plant.

Appellants also contend that since Mr. Korholz by reason of his continuing guarantee was obligated to pay on the Bierig note if Mr. Bierig failed to do so, the payments were made in discharge of that obligation rather than as a gift to influence Bierig as a labor representative. Further appellant Korholz charges that since the transaction was entered at a time when Bierig did not represent employees of Rock Wool Insulating Company, the application of the statute as to him creates an ex post facto situation violative of his constitutional rights. Aside from the evidence which might be construed as demonstrating a plan to avoid the interdiction of the statute, Korholz is not charged as an employer but in aiding and abetting the employer in making the payments. The dereliction was in causing the employer to make the payments on Bierig's behalf and his actual motive was submitted to the jury for consideration by the court's instruction:

> "Before there can be a conviction in this case it must be established beyond a reasonable doubt that acts charged in the indictment and in violation of the statute were done knowingly and wilfully. Now, the word 'knowingly' as used in the indictment, as used in these instructions means intentionally and with an awareness and consciousness of what one is doing. Now, the word

> *'wilfully'* as used in the statute and in the indictment and in these instructions connotes an intentional violation of the law, and you are advised, ladies and gentlemen of the jury, that a defendant who actually does violate the provisions of law here involved would not be guilty of a criminal offense unless he is *either conscious of the fact that what he is doing constitutes a violation of the law or unless he wholly disregards the law and pursues a course without making any reasonable effort to determine whether the plan he is following would constitute a violation of the law or not.*" (Emphasis added.)

Finally, appellants urge error in the court's refusal to give their tendered instruction on wilfulness which emphasized the criminal intent aspect of that word, requiring the jury to acquit unless they found that the payments were made with a bad purpose or motive and without justifiable excuse. The distinction between the two views is set forth in United States v. Illinois Cent. Rr. Co., 303 U. S. 239, at 242, 58 S. Ct. 533, 82 L. Ed. 773:

> "In statutes denouncing offenses involving turpitude, 'willfully' is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in United States v. Murdock, 290 U. S. 389, 394, shows that it often denotes that which is 'intentional, or knowing, or voluntary, as distinguished from accidental,' and that it is employed to characterize 'conduct marked by careless disregard whether or not one has the right so to act. . . .'"

The crime charged is one of those not wrong in itself but prohibited by statute to protect labor relations from anticipated corruption. The statute was described in United States v. Ryan, supra, as *malum prohibitum*. Thus, it is

clear that the language of the instruction was accurate in its definition of "wilfully" as used in the statute.

AFFIRMED.

APPENDIX B

Judgment.

Fifty-Fifth Day, May Term, Thursday, August 20th, 1959.

Before Honorable Sam G. Bratton, Honorable Orie L. Phillips and Honorable David T. Lewis, Circuit Judges.

This cause come on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

(By order of August 26, 1959, the time for appellants' petition for rehearing was extended to September 9, 1959.

APPENDIX C

Order amending opinion.

Ninth Day, September Term, Friday, September 18th, 1959.

Before Honorable Sam G. Bratton, Honorable Orie L. Phillips and Honorable David T. Lewis, Circuit Judges.

It is now here ordered by this court that the typewritten opinion in this cause, filed August 26, 1959, be amended by striking therefrom the language which appears on page 11 as follows:

"From July 6, 1953 to August 21, 1955, there was A 'recognition agreement' in effect between the Company and local No. 146."

APPENDIX D

Order denying petitions for rehearing.

Ninth Day, September Term, Friday, September 18th, 1959.

Before Honorable Sam G. Bratton, Honorable Orie L. Phillips and Honorable David T. Lewis, Circuit Judges.

These causes came on to be heard on the petitions of appellants for a rehearing herein and were submitted to the court.

On consideration whereof, it is ordered by the court that the said petitions be and the same are hereby denied.

(By order of September 22, 1959, the mandate of the United States Court of Appeals was stayed to October 18, 1959, under provision of paragraph 3 of rule 28 of said court.)

FILE COPY

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DEC 4 1950
JAMES R. BROWNING, Clerk

No. 48

In the Supreme Court of the United States

October Term, 1950

Hunter Marston, Secretary and Sole Trustee, Local Union No. 1, United Mine Workers of America, Individually and as Representative of All Members of Said Local Union No. 1, United Mine Workers of America, Petitioner,

v.

United States of America

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. Lee Rankin,
Solicitor General,

Douglas B. Wilkins,
Assistant Attorney General,

Ernest A. Gross,
Richard W. Barnum,
Attorneys,
Department of Justice,
Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 482

HERBERT FREDERICK, KORHOLZ AND ROCK WOOL INSULATING COMPANY, ALSO KNOWN AS ROCK WOOL INSULATION CORPORATION, A CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A, 1a-11a) is reported at 269 F. 2d 897.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 1959 (Pet. App. B, 11a). On September 18, 1959, a petition for rehearing was denied but the opinion of the court of appeals was amended by striking a sentence therefrom (Pet. App. C and

D, 11a-12a). The petition for a writ of certiorari was filed on October 16, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to sustain the convictions under Section 302(a) of the Labor Management Relations Act of 1947 for the unlawful payments by an employer to a representative of its employees.

2. Petitioners also raise but do not extensively argue the following questions:

a. Whether the indictment was duplicitous.

b. Whether there was a fatal variance between the allegations and the proof.

c. Whether the trial court properly instructed the jury on the question of wilfulness.

STATUTES AND RULES INVOLVED

Section 302 of the Labor Management Relations Act of 1947, 61 Stat. 157, 29 U.S.C. 186, provides in pertinent part:

> (a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.
>
> (b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

(c) The provisions of this section shall not be applicable * * * (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; * * *.

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

* * * *

18 U.S.C. 2 provides as follows:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Rule 8, F. R. Crim. P., provides in pertinent part:

(a) Joinder of offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

* * * *

STATEMENT

A two-count indictment returned in the District Court for the District of Colorado charged the petitioners, Rock Wool Insulating Company and its president, Herbert F. Korholz, with the payment and delivery of $2,305 to Fred Bierig, the president of Local 146, Teamsters, Chauffeurs, Warehousemen and Helpers of America Union, whose membership included certain employees of Rock Wool, and the unlawful receipt of such money by Bierig, in violation of Section 302(a) and (b) of the Labor Management Relations Act of 1947, 61 Stat. 157, 29 U.S.C. 186, *supra*. The payments in question were charged as extending from June 15, 1954, to April 17, 1956 (R. 9-10). It was stipulated that Bierig was the president of Local 146 from 1952 to September 12, 1958; that Rock Wool employed labor in an industry affecting commerce; and that Korholz was president of Rock Wool from October 9, 1951, to September 12, 1958 (R. 15-16, 54-55). Following a trial by jury, petitioners and Bierig were found guilty. Each was fined $500, and Korholz and Bierig were sentenced to serve a four-month term of imprisonment (R. 30-32, 221). On appeal, the convictions were affirmed (Pet. App. A, 1a-11a). Bierig does not seek review of his conviction by this Court.

The pertinent facts are as follows:

1. On August 6, 1953, Bierig borrowed $2,000 from a bank in Pueblo, Colorado, and gave his promissory note for $2,060 due in six months (R. 83-85, 117, 125). Korholz was co-maker of the note and signed a "continuing guarantee form" (R. 84-85,

118-119, 129-130).[1] Initially, Bierig paid $60 on the interest and $500 on the principal (R. 117, 125). On February 2, 1954, a renewal note in the amount of $1,515 was issued by the bank (R. 120, 125).[2]

When the indebtedness was not paid on the note, the bank called on Korholz to make good his obligation as co-maker (R. 86, 130; see R. 116, 140-141). Beginning on June 15, 1954, through a series of payments and subsequent note renewals, the entire debt was liquidated by April 17, 1956 (R. 115-116, 121-122). In December 1954, the bank, on authorization by Korholz, advanced an additional $800 to Bierig (R. 127; see R. 206),[3] which sum was included in the amount paid off to the bank. Bierig paid practically all the interest while Rock Wool paid the outstanding principal. On Rock Wool's books the payments were treated in 1954 as an advance to Korholz (R. 148-149), and in 1955 as an advance to the "MPM Investment Company" (R. 149), a company owned and controlled by Korholz (R. 149; see R. 42). In most of the transactions, Rock Wool's account with the bank would be debited and MPM's account cred-

---

[1] This form is designed to eliminate the necessity for having the co-maker sign the renewal notes (R. 118).

[2] The record of the trial does not contain any substantial evidence with respect to the initiation of the relationship between petitioner Korholz and Bierig. Bierig's affidavit in support of the motion for a new trial gives his version (R. 20-21).

[3] In his affidavit in support of a motion for a new trial, Bierig stated that Korholz, who had seen Bierig's mother in Germany, gave Bierig the $800 so that he could take a trip to Germany to visit her (R. 28).

ited accordingly. This would enable MPM's account to be debited to the credit of the Bierig note (R. 115-116, 121-122, 126-129; see R. 111-112) for, without the transaction with Rock Wool, MPM's account would not have sufficient funds to cover the payments on the note (R. 115-116). For the year 1956, Rock Wool's books had a "labor relations account" which included the actual payments made on the Bierig note (R. 139). When informed by his accountant that such items were not deductible for tax purposes, Korholz stated that he felt sure that the account was a cost of doing business (R. 139-140). Korholz told a retained accountant in September 1956 that the payments made on the Bierig note were for "labor relations services" (R. 144, 148).

2. It was stipulated that from August 31, 1955, Local Union 146, of which Bierig was president, was designated by the National Labor Relations Board as representing the majority of employees of Rock Wool (R. 15, 52, 55).

Evidence was introduced which indicated that, commencing in late 1953, Rock Wool's truck drivers applied for and were accepted into the membership of Local Union 146 (R. 150-152). During the period covered by the indictment (June 15, 1954-April 17, 1956), Local 146 had union members from Rock Wool's truck drivers (R. 150-152, 155, 157-159, 162, 164-165, 167; see R. 76-80 and Gov. Exs. 38, 39, 40 and 42). These members felt that the union would represent them (R. 155-156, 160, 166, 168-169). Union dues were deducted from their payrolls and paid to the union (R. 152, 154, 161, 166, 170). It

was necessary that some drivers be union workers if they were to make deliveries to union jobs (R. 154). One union member testified that he complained in 1954 to Bierig regarding the working hours of the truck drivers, and that Bierig said that he would do something about it (R. 161-162), although nothing in fact resulted from his conversation (R. 162, 163).[4]

3. In the instructions to the jury, the trial judge charged, in part (R. 232):

> Before there can be a conviction in this case it must be established beyond a reasonable doubt that acts charged in the indictment and in violation of the statute were done knowingly and wilfully. Now, the word "knowingly" as used in the indictment, as used in these instructions means intentionally and with an awareness and consciousness of what one is doing. Now, the word "wilfully" as used in the statute and in the indictment and in these instructions connotes an intentional violation of the law, and you are advised, ladies and gentlemen of the jury, that a defendant who actually does violate the provisions of the law here involved would not be guilty of a criminal offense unless he is either conscious of the fact that what he is doing constitutes a violation of the law or unless he wholly disregards the law and pursues a course without making any reasonable effort to determine whether the plan he is following would constitute a violation of the law or not.

---

[4]The trial judge excluded evidence as to a recognition agreement between the union and Rock Wool from July 1953 until its certification in 1955, on the ground that this would not show that Bierig represented employees (R. 56-72, 178-179).

And further (R. 236):

> You are further instructed that in determining whether or not the acts done by the defendant Herbert Frederick Korholz, if you believe the commission of such acts to have been proved beyond a reasonable doubt, were done wilfully as that term has been heretofore defined in these instructions, you may condition [sic] the fact if it be a fact that on August 6, 1953, the defendant Herbert Frederick Korholz became obligated to pay the indebtedness of the defendant Fred William Bierig to the Arkansas Valley Bank if such indebtedness was not paid by the defendant Fred William Bierig.

On the question of representation, the judge charged (R. 235-236):

> You are further instructed that the word "representative" as used in Section 186 of the National Labor Relations Act and elsewhere in these instructions is used in its ordinary everyday meaning and means a labor representative. As such it includes any person who is empowered, authorized or designated in any way, directly or indirectly, by any employee or employees to represent such employee or employees in any matter relating to their wages or hours or working conditions by standing in place of such employee or employees in any responsible dealings with the employer involving such matters. If a person be so authorized to act, it is not necessary that he actually exercise all or any of the powers conferred upon him. Any labor organization such as a local union, which is empowered, authorized or designated by any employee or employees to act on his or their behalf

in dealing with the employer with respect to hours, wages or working conditions is by virtue thereof a representative of such employee or employees, and any individual, who actively holds and occupies an office or position of responsibility in any such local union, who is empowered or authorized in such office or position to act for any such labor organization in which he holds office in such way as to affect any such employee in a substantial way in any dealings with the employees' employer with respect to hours of labor, wages or working conditions is thereby also a representative of such employee or employees.

ARGUMENT

1. The gist of petitioners' arguments with respect to the first three questions they present (Pet. 3-4) is that the evidence in this case does not support the verdict. The contention is that there is no evidence that the original signing of the note by Korholz in the summer of 1953 was illegal since there was no proof that any Rock Wool employee was a member of the union at that time; and that the subsequent payments of the note from June 1954 to April 1956 must be deemed merely a discharge of Korholz's personal legal obligation on the note, and not a payment by the employer (Rock Wool) to a representative of its employees (Bierig).

This argument fails to take account of certain facts in the record and assumes other facts not in the record. For one thing, it omits the salient fact that in December 1954, when the union clearly did represent some truck drivers (see Gov. Exs. 38, 39,

40 and 42), only seven months before the union became the designated bargaining agent, Korholz authorized an additional loan to Bierig of $800, which Rock Wool subsequently paid (*supra*, p. 5). In no sense can this additional $800 be considered as discharging any obligation incurred by Korholz in 1953; it was a new transaction. Moreover, even as to the original note, the fact is that Rock Wool did not start to make the payments until June 1954, at which time drivers for Rock Wool were members of Bierig's union and union dues were being deducted by the company and paid to the union. Petitioners assert that Bierig was in financial straits at the time, but they presented no evidence to that effect to the jury.[5] As the trial judge pointed out in chambers in the argument on the motion for judgment of acquittal (R. 210), it was for the jury to decide whether petitioner Korholz was merely paying off his own personal legal obligation or was using this as a method of paying money to Bierig (in violation of the Act). The judge did charge the jury that, on the issue of knowledge, they could take into consideration the fact that Korholz had a pre-existing

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[5] Petitioners now rely on Bierig's affidavit in support of the motion for a new trial (R. 20-29). If that affidavit could be considered at all, it would also be necessary to consider Bierig's allegation that in May 1953 he did talk with Korholz about a recognition agreement with Rock Wool; that in July 1953 Bierig and Graf (secretary-treasurer of the union) took a trip to various building and trades councils to help increase sales for Rock Wool; and that certification of Bierig's local in August 1955 came after the United Mine Workers started organizing Rock Wool employees (R. 22-21).

legal obligation on the note (see the Statement, *supra*, p. 8). But the jury had the right to consider all the circumstances—the time and setting when Rock Wool started to make payments on the notes in June 1954; the authorization of the additional $800 loan in December 1954 although Bierig was then in default; and the characterization of the payments on the books of Rock Wool (and in Korholz's statements to the accountants) as being for labor relations services. Together, these circumstances adequately support the jury's conclusion that the total picture showed that an employer of labor did not merely discharge the pre-existing personal obligation of its president, but that the employer knowingly made payments to a representative of its employees on its own behalf.*

As this Court pointed out in *United States* v. *Ryan*, 350 U.S. 299, Section 302(a) punishes as a misdemeanor the giving of money by an employer to a representative of employees, without any requirement of proof of improper motive or attempt

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* Section 302(c) contains five exceptions to the unlawful payments between employer and the representative of its employees which Congress has proscribed in Section 302(a) and (b) (*Arroyo* v. *United States*, 359 U.S. 419, 420). One of the exceptions, Section 302(c)(2), *supra*, allows the employer to pay to the representative of its employees the judgments, arbitration awards, or, if the dispute has not reached a final, formal decision, payments in settlement or compromise of outstanding claims or disputes (between labor and management). Payments to liquidate the *bank's* claim—if they constituted, in reality, payments to a labor representative not in settlement of *his* claim against the employer—fall outside the ambit of Section 302(c)(2).

to exercise influence. An employer is flatly prohibited from making gifts to an employee representative. The jury could properly find in this case that the payments were the kind of gift the statute prohibits.[7]

Similarly, the judge under proper instructions submitted to the jury the issue of whether Bierig was a representative of employees (see the Statement, *supra*, pp. 8-9). The record indicates that a number of truck drivers, all company employees, were members of Local 146 and had their dues deducted from the payrolls, even before the August 1955 certification; that the truck driver-members felt that the union would represent them; that dues were deducted from their paychecks by Rock Wool; that on one occasion Bierig told a member that he would do something about a member-complaint (although nothing in fact resulted from the conversation) (see the Statement, *supra*, pp. 6-7). The jury had ample evidence to support its finding that Bierig was a representative of Rock Wool's employees, within the meaning of Section 302 as interpreted by this Court in *Ryan, supra*.

2. Petitioners save but do not extensively argue several points (Pet. 20-21). None merits review here.

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[7] Contrary to petitioners' assertion (Pet. 16), there is substantial evidence of the nature of the financial relationship between Rock Wool and Korholz as to the payments on this loan (see the Statement, *supra*, p. 5-6). That Korholz knew he was having the company make payments to Bierig, including payments on the $800 increase in December, is clear on this record. On this point, that is all that is necessary in order to prove the violations by these petitioners.

a. They contend that the indictment is duplicitous and offends Rule 8(a), F. R. Crim. P., *supra*, in that it "alleges a number of alleged offenses [*i.e.*, numerous payments on the note], thus depriving the petitioners of the opportunity to make a defense against a particular alleged violation." But as the court below noted, the gravamen of the charge was the payment of money in violation of the statute. The proof was that the payments were made through a series of transactions (Pet. App. A, 4a). It would hardly be to petitioners' advantage to have each payment treated as a separate offense. A count is not bad for duplicity where it charges the commission of several acts, which alone may constitute distinct offenses. *United States* v. *Hood*, 200 F. 2d 639, 641 (C.A. 5); *Hanf* v. *United States*, 235 F. 2d 710, 715 (C.A. 8), certiorari denied, 352 U.S. 880; *Mellor* v. *United States*, 160 F. 2d 757, 762 (C.A. 8), certiorari denied, 331 U.S. 848; *Rowan* v. *United States*, 281 Fed. 137, 139 (C.A. 5), certiorari denied, 260 U.S. 721. See *Bell* v. *United States*, 349 U.S. 81, 83-84.

b. Petitioners also argue (Pet. 21) that there was a "fatal variance" between the allegations charging a payment of money to a representative of the employees and the proof showing the payments on the Bierig note to the bank.

There can, however, be no doubt that Bierig directly benefited financially from the payments. We believe that there was no variance, but in any event petitioners cannot show that they were prejudiced by the proof of payment to the bank; any variance

in this respect was harmless. Cf. *Berger* v. *United States*, 295 U.S. 78, 82; *Bennett* v. *United States*, 227 U.S. 333, 338; *Kercheval* v. *United States*, 36 F. 2d 766 (C.A. 5), certiorari denied, 281 U.S. 745; *United States* v. *Pile*, 256 F. 2d 954, 957 (C.A. 7); *Rathbun* v. *United States*, 236 F. 2d 514, 516 (C.A. 10), affirmed, 355 U.S. 107; *Cromer* v. *United States*, 142 F. 2d 697, 698 (C.A. D.C.), certiorari denied, 322 U.S. 760; *Andrews* v. *United States*, 108 F. 2d 511, 515 (C.A. 4).

c. Finally, petitioners seek review of the trial court's instructions on the definition of "wilfully" (see the Statement, *supra*, pp. 7-8). They proffered their own instruction on the definition of "wilfully" as meaning with "bad purpose" or "bad motive", which was rejected by the trial court (R. 223). As the court below pointed out (Pet. App. A, 10a-11a), the offenses charged are *malum prohibitum*. *United States* v. *Ryan*, 350 U.S. 299, 305. Instructions on the definition of "wilfully" as meaning "intentional" or voluntary were therefore proper. *United States* v. *Illinois Central R. Co.*, 303 U.S. 239, 242-243.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

MALCOLM R. WILKEY,
Assistant Attorney General.

BEATRICE ROSENBERG,
RICHARD W. SCHMUDE,
Attorneys.

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IN THE

Supreme Court of the United States

October Term, 1959

No. 482

HERBERT FREDERICK KORHOLZ, ROCK WOOL INSULATING COMPANY, also known as ROCK WOOL INSULATION CORPORATION, a corporation, *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

PHILIP B. PERLMAN
1021 Tower Building
Washington 5, D. C.
Attorney for Petitioners

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

I. No Offense Against the Labor Management Relations Act of 1947 Was Committed

In its brief in opposition, the Government makes efforts to divert attention from the main issue in this case: whether an act, perfectly innocent when done, can become criminal through a subsequent independent transaction. That issue is of paramount importance here.

It is undisputed that when Korholz, president of Rock Wool, personally guaranteed on August 6, 1953, payment to the bank of Bierig's loan, not a single one of Rock Wool's employees belonged to the union. The

Government does not deny this. It follows that no offense was committed at the time the guarantee was made. There is no evidence whatever that there was any intent then or thereafter to violate or evade any law.

The first payment on his loan—a substantial payment of $500—was made by Bierig himself, the borrower, president of the union. It was not until April 3, 1954 that Korholz paid anything ($300) to the bank on the Bierig loan. This payment on account was made after Bierig had defaulted, and the bank had demanded that Korholz make good on his guarantee (Brief in Op. p. 5). On September 21, 1955, more than two years after Korholz guaranteed payment of the loan, the union of which Bierig was president became the bargaining agent of Rock Wool's employees. During the interim, and as a consequence of the union's efforts to unionize the Rock Wool operation, some of the drivers (about five all told) joined and left the union intermittently. The record does not show accurately the period when each one was in or out of the union, even if their membership or the temporary membership of any one of them is relevant for any purpose.

The Government fails to dispute, because it cannot, that Korholz's guarantee of Bierig's loan violated no law when made. And this Court has held, as stated in the petition, that "the criminal intent essential to a public offense must exist when the act complained of is done; it cannot be imputed to a party from a subsequent independent transaction." *United States* v. *Fox*, 95 U. S. 670. To the same effect are *United States* v. *Dietrich*, 126 Fed. 671, and *Terry* v. *United*

States, 131 F. (2d) 40. All three of these cases are cited on our petition, but not a single one of them is mentioned in the Government's brief in opposition. Those citations are dispositive of this case.

II. Bierig Received Nothing From Rock Wool

The Act of 1947 makes it an offense for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of his employees. There is no evidence in the record to prove that Rock Wool, indicted as the employer, paid anything to Bierig, president of the union local, or agreed to pay him anything. The obligation to pay was Korholz's individual obligation. There is no evidence whatever to prove that Bierig, whose debt was reduced as a result of the bank's demands on Korholz, ever knew Rock Wool, the alleged employer, in the transaction, or had any idea that Rock Wool's account was being used by Korholz to reduce the debt. The payments made to the bank were charged as made on Rock Wool's books to Korholz or to M.P.M. (Korholz's family investment company), and eventually to Rock Wool, but the record is silent as to the nature of the financial relationship between Rock Wool and Korholz, so that it may be that all of the funds were really Korholz's, no matter what entries were made. (See note 4, page 9 of the Petition).

III. The Entire Transaction Is Outside the Purview of the Act of 1947 and of the Indictment

The indictment charges merely the payment of money, and omits payment of a thing of value included in the statute. What has happened is that Bierig's liability was transferred over the years from

the bank to Korholz. Bierig still owes the money to Korholz, and not to Rock Wool, with which he had no financial relationship whatever. And there never was any "payment" of money by anybody to Bierig. The Act of 1947 did not treat a loan as a payment of money, and it cannot be construed to include loans as such payments. As pointed out, if the making of a loan is a thing of value, the indictment in this case fails to make a charge that Bierig was paid a thing of value.

The Government, in the trial below, proved the *bona fides* of the loan to Bierig. He not only paid $500 on account of the loan, but the Government proved that Bierig paid all of the bank's interest charges on the loan (except the last $5) over the period beginning August 6, 1953, and ending early in 1956 (See Gov. Ex. 45, column captioned "Interest"). Interest charges paid by Bierig out of his own pocket amounted to a total of $201.47. This evidence, offered by the Government, is, we submit, sufficient proof that no offense was committed at any time by Rock Wool, by Korholz or by Bierig. Nobody in Bierig's financial situation pays out hundreds of dollars in interest on an alleged gift of money, and that is what the indictment charges.

The Government, in its Brief in Opposition, endeavors to make much of the fact that, after Bierig reduced his loan from the bank by $500, he obtained an increase in his loan by $800 (on which he likewise paid interest). Of course, Korholz (not Rock Wool) agreed to this increase, and Korholz (not Rock Wool) was obligated to guarantee it under the document he signed on August 6, 1953. Because of the reductions

which had been made by Bierig and by Korholz on the amount of the original loan, this addition did not increase the debt above the original amount (Petition, p. 8, 9). And again we point out that the union did not become the bargaining agent for Rock Wool's employees until August 21, 1955, more than two years after Bierig made his original loan from the bank and approximately eight months after the reduced loan was increased.[1]

IV. The Government Fails to Meet Other Important Issues

The Government simply ignores the fact that the record does not prove that Bierig was the representative of the employees within the meaning of the Act despite his title as president, but that Graf was. The Government does not meet the issue expressly left open in *United States* v. *Ryan*, 350 U.S. 299. In this case the Government proved only that Bierig was the president, and practically nothing else on the point. This record does not show what Bierig's duties really were. The Government also endeavors to minimize or eliminate the effect of the plain language of the exception in Section 302(c)(2) of LMRA of 1947. We submit that the provisions of the act do not apply to the settlement or release of any claim. The Government (note 6, page 11 of its Brief in Opposition) undertakes to summarize its interpretation of the statute, and in so doing adds language which changes its meaning and application. The Government says that the section

[1] The record does not show it, but we are now advised that the employment contract with the drivers (dated April 24th, 1956) was made by the union with MPM Investment Company, (Korholz's family corporation) and not with Rock Wool.

"allows the employer to pay to the representative of its employees the judgments, arbitration awards, or, if the dispute has not reached a final, formal decision, payments in settlement or compromise of outstanding claims or disputes (between labor and management)."

But this is not the language of the statute at all. The statute reads as follows: "The provisions of this section shall not be applicable * * * (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress." The statute exempts "any claim." This Court, of course, will not permit the Government to add or insert its own phraseology by parenthesis or otherwise to the Act of 1947 for the purposes of this case.

The Government adopts a suggestion that the amounts charged to Korholz or to MPM on Rock Wool's books were eventually charged off on Rock Wool's books for labor relations services. (Brief in Op. p. 11). But this ignores the fact that the witness Best testified (R. 139) that the charge had been eliminated on the income tax return; and Thompson testified (Petition, p. 9, 10) that the items could not be charged to the current year's (1957) expense. What was done in 1957 is irrelevant, as the period laid in the indictment terminated April 17, 1956, but apparently the Government, once the prejudicial suggestion was made, did not attempt to prove what actually happened. There is every reason to believe, however, that Korholz followed the advice given him

by his accountants. Certainly none of them testified to the contrary.

CONCLUSION

The convictions in this case involve a serious miscarriage of justice which, we believe, could only happen during a period when the public was inflamed over the charges of corruption and worse in certain labor unions, particularly the Teamsters. We respectfully submit that the writ should be granted, and, if the Court agrees that acts innocent when done cannot become criminal by subsequent independent transactions, the judgment should be reversed.

PHILIP B. PERLMAN
1021 Tower Building
Washington 5, D. C.
Attorney for Petitioners